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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	78519618
Applicant	Microvision Optical, Inc.
Applied for Mark	FRAMELOCK
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Submission	Appeal Brief
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Date	09/12/2006

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of: Microvision Optical, Inc. Serial No.: 78/519618 Filed: November 18, 2004 Trademark: **FRAMELOCK**	Law Office 116 Trademark Attorney: William Breckenfeld

BRIEF FOR APPELLANT

INTRODUCTION

Applicant (hereinafter "Appellant") hereby appeals from Examiner's final refusal to register the above-identified trademark, dated June 30, 2005, and respectfully requests that the Trademark Trial and Appeal Board reverse Examiner's decision rejecting the subject mark as being confusingly similar to U.S. Registration No. 2,222,472 for FRAMELOC in International Class 006 for "fasteners, namely, metal screws."

APPELLANT'S TRADEMARK

Appellant seeks registration on the Principal Register of its mark FRAMELOCK in International Class 009 for "eyeglass frames and fasteners."

ARGUMENT

This communication is responsive to the Office Action dated June 30, 2005. Appellant respectfully submits the following appeal brief offering arguments in support of the mark's registration.

I. BACKGROUND

Appellant, Microvision Optical, Inc., is a company whose mission is to provide new and innovative solutions for vision correction. In furtherance of this goal, Appellant employs a team of creative-thinking technical engineers to invent and design eyeglasses and eyeglass related products to satisfy general consumer optical correction needs that are

not being adequately addressed by existing products. Appellant currently owns several federal registrations including TAPER LOK (Reg. No. 2,415,506), NEOX (Reg. No. 3,082,119), and MICROVISION OPTICAL (Reg. No. 2,672,151) among many others.

II. NO LIKELIHOOD OF CONFUSION

Examiner has refused registration of Appellant's mark FRAMELOCK based upon perceived likelihood of confusion with U.S. Registration No. 2,222,472 for the mark FRAMELOC in International Class 006 for "fasteners, namely, metal screws." Appellant respectfully submits that there is no likelihood of confusion between these marks as the likelihood of confusion requires that the confusion be probable and not simply possible. See HMH Publishing Co. v. Brincat, 183 U.S.P.Q. 141, 144 (9th Cir. 1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 136 U.S.P.Q. 508, 518 (9th Cir.), cert. denied, 374 U.S. 380, 37 U.S.P.Q. 913 (1963); J.B. Williams Co. v. Le Conte Cosmetics, Inc., 186 U.S.P.Q. 317 319 (9th Cir. 1975). Additionally, "[t]he test for likelihood of confusion is whether a 'reasonably prudent consumer' in the marketplace is likely to be confused as to the origin of the goods or services bearing one of the marks." Dreamwerks Production Group, Inc. v. SKG Studio, 142 F.3d 1127, 1129 (9th Cir. 1998).

Appellant respectfully submits that its mark is not confusingly similar to the prior Registrant's mark, because they (A) are used in conjunction with different goods; (B) employ distinctly dissimilar methods of marketing and channels of distribution; (C) are visually distinguishable; and (D) exist in a crowded field of similar marks.

A. Marks Are Used in Conjunction with Dissimilar Goods

Examiner contends that Appellant's eyeglass frames and fasteners "overlap" the cited registration's metal screws since "most eyeglass frame fasteners are metal screws."

As such, Examiner believes the alleged overlapping goods are likely to confuse consumers into thinking the goods come from the same source. Appellant respectfully disagrees and submits that the goods in question are so dissimilar as to avoid any potential for consumer confusion.

If the goods or services identified by the marks at issue are not related or marketed in such a way as to be encountered by the same consumers in situations that would create the incorrect assumption that they originate from the same source, then confusion is unlikely, even if the marks are identical. See e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd., 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); Local Trademarks, Inc. v. Handy Boys Inc., 16 U.S.P.Q.2d 1156 (TTAB 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services in the plumbing field); TMEP § 1207.01(a)(i).

Additionally, pursuant to 15 U.S.C. § 1057(b), "the Lanham Act only gives a registered trademark owner exclusive rights to use the mark in commerce 'on or in connection with the goods or services specified in the certificate.'" See Davis v. Walt Disney Co., 75 U.S.P.Q.2d 1044, 1048 (D. Minn. 2005); In re Wella A.G., 5 U.S.P.Q.2d 1359, 1362 (TTAB 1987). Furthermore, courts have held that when two services fall within the same general field it does not mean the two services are sufficiently similar to create a likelihood of confusion. See Harlem Wizards Entertainment Basketball, Inc. v. NBA Properties, Inc., 952 F. Supp. 1084, 1086 (D.N.J. 1997) (holding that plaintiff's theatrical brand of "show basketball" was markedly different from the competitive basketball played in

the NBA and any similarity between the teams was superficial and the result of creating overinclusive categories that are irrelevant to the likelihood of confusion).

In the instant case, Registrant has designated its mark only for use in relation to "fasteners, namely, metal screws," in International Class 006. Registrant had the option to designate more products in Class 006 but chose not to do so. Further, Registrant has not registered FRAMELOC in any other category, for any other goods or services. As such, Registrant has not identified use of its mark for any product or service whatsoever that relates to eyeglasses, fittings, eyeglass fasteners, or eyeglass frames. In fact, the FRAMELOC mark is not used in conjunction with *any* goods or services that could potentially fall into International Class 009, which is Appellant's designated International Class for FRAMELOCK.

Additionally, consumers are not likely to confuse the "FRAME" in Appellant's mark with the "FRAME" in the cited mark. Appellant's FRAME refers specifically to the frames of eyeglasses. Appellant's business, Microvision Optical, manufactures and sells exclusively eyeglass related products. Microvision's website (available at www.microvisionoptical.com) solely contains product listings and news for their unique, patented eyeglass designs. On the other hand, the cited mark FRAMELOC is owned by the hardware company Fastec Industrial, and has no connection whatsoever to eyeglasses. Fastec Industrial's website (available at www.fastecindustrial.com), does not contain any reference to products similar to Appellant's "eyeglass frames and fasteners." Rather, the company identifies itself as a manufacturer of door locks, kitchen and bath hardware, compartment locks, and drawer slides.

It is very likely that the FRAME in the cited mark refers to metal hardware frames as opposed to eyeglass frames. In fact, Fastec Industrial's submitted USPTO trademark specimens for the cited mark contain the term FRAMELOC in reference to 9mm X 76mm washers and bolts, typically used in heavy-duty construction projects and appliances. (See attached printout of FRAMELOC U.S. Registration No. 2,222,472 trademark specimen). The washers and bolts used in conjunction with the cited mark are also clearly visible on Fastec Industrial's website. (See attached printout of Fastec Industrial's homepage displaying FRAMELOC washers and bolts). It is highly unlikely consumers would confuse small metal eyeglass fasteners with the construction grade hardware sold under the cited mark. The goods offered under the marks at issue are significantly dissimilar, and pose little or no risk of consumer confusion.

B. Different Methods of Marketing and Channels of Distribution

Appellant respectfully submits that the methods of marketing and channels of distribution employed by Appellant differ significantly from those utilized by Registrant, thus tending to eliminate customer confusion. Methods of marketing and channels of distribution are factors to be considered in determining likelihood of confusion. In re E.I. DuPont de Nemours & Co., 177 U.S.P.Q. 563 (1973). "If the goods of one party are sold to one class of buyers in a different marketing context than the goods of another seller, the likelihood that a single group of buyers will be confused by similar trademarks is less than if both parties sold their goods through the same channels of distribution." See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:51 (2001). Additionally, courts have frequently found no likelihood of confusion when one mark user sells exclusively at retail and the other sells exclusively to commercial buyers. See Id.

(citing Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959); David Crystal, Inc. v. Soo Valley Co., 471 F.2d 1245 (C.C.P.A 1973); Alpha Industries, Inc. v. Alpha Steel Tube & Shapes, Inc., 616 F.2d 440 (9th Cir. 1980)).

Furthermore, even when related goods or services are distributed in differing marketing channels, the courts have often found no likelihood of confusion. See Paul Sachs Originals v. Sachs, 325 F.2d 212 (9th Cir. 1963) (finding no likelihood of customer confusion when girl's dresses and women's dresses sold to different customers in different stores); Field Enterprises Educ. Corp. v. Cove Industries, Inc., 297 F. Supp. 989 (E.D.N.Y. 1969) (finding different channels of encyclopedia distribution–door to door sales versus department store sales). In Este Lauder Inc. v. Gap, Inc., 108 F.3d 1503 (2d Cir. 1997), the court distinguished marketing channels by the characteristics of the customers and the location of the sales. Plaintiff sold its personal care products only through prestigious retail stores while the defendant sold to a younger group of buyers through its own "Gap Old Navy" stores. The court found that while the customers could overlap, the differences in locations and the target markets were sufficient to prevent the likelihood of confusion. Id.

In the instant case, contemporaneous use of the marks at issue for their respective goods is not likely to cause confusion. Based on the recitation of goods accompanying the cited registrations and further research into the actual goods offered under those marks, Appellant argues that consumer confusion is highly unlikely. The goods offered under Fastec's FRAMELOC are likely marketed to manufacturers and craftsmen as component hinge and fastener parts for larger projects. On the other hand, the goods offered under Appellant's FRAMELOCK are marketed to end-user consumers as a distinct feature of a complete pair of eyeglasses. Since the two marks are used for different goods and

services, marketed to different customers, and placed in very different commercial settings, it is highly unlikely consumer confusion will occur between the two marks.

C. The Marks Are Visually Distinguishable

Marks are found to be confusingly similar when they are the same in appearance, sound and meaning. Horn's, Inc. v. Sanofi Beaute, Inc., 963 F. Supp. 318, 322 (S.D.N.Y. 1997) (citing Revlon, Inc. v. Jerell, Inc., 713 F. Supp. 93, 98 (S.D.N.Y. 1989)). According to the Trademark Manual of Examining Procedure, "similarity of marks in one respect - sight, sound or meaning - will not automatically result in a finding of likelihood of confusion even if the goods are identical or closely related." TMEP § 1207.01(b)(i), citing In re Lamson Oil Co., 6 U.S.P.Q.2d 1041, 1043 (TTAB 1987). Here, Appellant's FRAMELOCK mark is at the very least different in sight (visual appearance) from the cited registration for FRAMELOC. The additional letter "K" in Appellant's mark is a relatively minor deviation from FRAMELOC, yet it creates a very different and distinctive overall appearance and commercial impression. Therefore, due to their different appearance, it is unlikely the two marks will cause consumer confusion.

D. The Marks Exist in a Crowded Field of Peacefully Co-Existing Marks

The T.T.A.B. has determined that when marks exist in a crowded field, similar marks with minor distinctions can be registered. See In re Broadway Chicken, Inc., 38 U.S.P.Q.2d 1559 (T.T.A.B. 1996). In that instance, the application for the mark BROADWAY CHICKEN was denied by the assigned Examiner based on his assertion that there was a likelihood of confusion between the Appellant's mark and other registrations containing the term "Broadway," e.g., BROADWAY PIZZA, BROADWAY CARRYOUT and BROADWAY DELI. In its reversal of the Examiner's refusal, the T.T.A.B. stated that

"evidence of widespread use, in a particular field of marks containing a certain shared term is competent to suggest that purchasers have been conditioned to look to other elements as a means of distinguishing the source of goods or services in the field." Id. at 1565-66.

Here, several registered marks are identical or substantially similar to Appellant's FRAMELOCK mark, yet all coexist peacefully. For example, aside from the cited mark FRAMELOC, registrations exist for FRAMELOCK (Ser. No. 78/151858) for medical apparatus bracket assembly; FRAMELOCK (Ser. No. 75/635462) for audio/visual and computer equipment; and FRAME LOCK (Ser. No. 78/142521) for extension poles and paint applicators. Further, several expired or abandoned marks were previously registered and peacefully co-existed with the cited mark. These marks include FRAMELOC (Ser. No. 74/192899) for seatbelt anchorages; FRAMELOCK (Ser. No. 73/560834) for computer programs; FRAME LOK (Ser. No. 76/046161) for fasteners, namely bolts, screws and washers; and FRAME-LOK (Ser. No. 75/563521) for website design.

As such, due to the large number of registered or previously registered similar marks it is highly unlikely that consumers would be confused regarding the source of origin of Appellant's mark. Appellant asserts that its application should garner the same treatment as these coexisting marks, and be permitted to register.

III. CONCLUSION

Appellant respectfully submits that there is no likelihood of consumer confusion between its mark and the cited registration. Appellant's mark is used in conjunction with different goods, employs distinctly dissimilar methods of marketing and channels of distribution and is visually distinguishable. Further, Appellant's and Registrant's marks are in a crowded field of similar marks that currently co-exist. Accordingly, Appellant

respectfully submits that this application is in condition for publication and favorable action is requested.

Respectfully submitted,

GREENBERG TRAURIG

Dated: _____

By: _____

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Las Vegas, Nevada 89109
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INDEX OF CITATIONS

500 PCS 10:21:40a 09/10/97

9MM X 76MM P.O. #

HEX WASHER HEAD 7530314

FRAMELOC LAG BOLT

MADE IN:
TAIWAN

PLAIN LBS.

M9X76HWFLP CB

500 PCS 10:21:40a 09/10/97

9MM X 76MM P.O. #

HEX WASHER HEAD LOT #

FRAMELOC LAG BOLT

MADE IN:
TAIWAN

PLAIN LBS.

M9X76HWFLP CB

500 PCS 10:21:40a 09/10/97

9MM X 76MM P.O. #

HEX WASHER HEAD LOT #

FRAMELOC LAG BOLT

MADE IN:
TAIWAN

PLAIN LBS.

M9X76HWFLP CB

Fastec Industrial

Our products are d
reputation for high
durability, backed b
customer service ef

»Products

Fastec Industrial Corp. provides a diverse line of product offerings including:

- Fasteners
- Nuts
- Washers
- Bolts
- Hinges
- Drawer slides
- Knobs
- Pulls
- Kitchen hardware
- Bath hardware
- Storage hardware
- Interior door locks
- Exterior door locks
- Flush RV door locks
- Rotary latches
- Compartment locks
- Vehicular lock and latching systems

Brand

- Exte
- Fasl
- Fran
- FX2
- Kwil
- Octa
- Pullt
- Qua
- Quic
- Win

top

Fastec Industrial Corp. warehouses and stocks literally thousands of different products a many product lines from some of the following manufacturers:

- Amerock
- Au-ve-co
- Belwith-Keeler
- FGV Hinges
- Harney
- Hingecraft
- Ives
- Jacob Holtz
- K.V. Products
- Kwikset
- L.E. Johnson
- Monterey Shelf